United Nations A/68/113

General Assembly

Distr.: General
26 June 2013

Original: English

Sixty-eighth session
Item 86 of the preliminary list*
The scope and application of the principle of universal jurisdiction

The scope and application of the principle of universal jurisdiction

Report of the Secretary-General

Summary

The present report has been prepared pursuant to General Assembly resolution 67/98, by which the Assembly requested the Secretary-General to prepare a report on the basis of information and observations received from Member States and relevant observers, as appropriate, on the scope and application of universal jurisdiction, including, where appropriate, information on the relevant applicable international treaties, their domestic legal rules and judicial practice.

* A/68/50.

13-37524 (E) 110713

Please recycle

I. Introduction

1. The present report has been prepared pursuant to General Assembly resolution 67/98. It reflects comments and observations received since the issuance of the report of 2012 (A/67/116) and should be read together with that and prior reports (A/65/181 and A/66/93 and Add.1).

2. In accordance with resolution 67/98, section II of the present report, together with tables 1 and 2, focus on specific information regarding the scope and application of universal jurisdiction on the basis of relevant domestic legal rules, applicable international treaties and judicial practice. Section III provides information received from observers, and section IV contains a synopsis of issues raised by Governments for possible discussion.

3. Responses were received from Australia, Colombia, Cuba, Greece, Hungary, Lebanon, Moldova, Panama and Spain.

4. Responses were also received from the African Union, the Council of Europe and the International Committee of the Red Cross.[1]

5. The complete submissions are available from the website of the Sixth Committee of the General Assembly (www.un.org/en/ga/sixth/) under the heading "Sixty-eighth session".

II. Scope and application of universal jurisdiction on the basis of the relevant domestic legal rules, applicable international treaties and judicial practice: comments by Governments

A. Basic legal rules

1. Constitutional and other domestic legal framework

Australia

6. Australia's courts have jurisdiction over the offence of slavery (section 270.1 of the Criminal Code) irrespective of whether the perpetrator was within or outside Australian territory at the time the offence was committed. Other offences under Division 270 are subject to "category B" jurisdiction. Under category B jurisdiction, where the conduct constituting these offences occurs outside Australia, Australian courts will only have jurisdiction where the perpetrator is an Australian citizen, an Australian resident or an Australia body corporate. Trafficking in persons (sections 271.2-271.4) and debt bondage (sections 271.8 and 271.9) offences are subject to category B jurisdiction.

7. The Crimes Legislation Amendment (Slavery, Slavery-Like Conditions and People Trafficking) Act 2013 entered into force on 8 March 2013. The Act amended Division 270 of the Criminal Code to introduce the new offences of forced marriage and forced labour. The Act has repealed the offence of sexual servitude (formerly section 270.6) and inserted new offences of servitude in all forms. The Act has also repealed the offence of deceptive recruiting for sexual services (formerly

[1] The Organization for Security and Cooperation in Europe advised that it had no relevant information or observations to submit.

section 270.7) and inserted a new offence of deceptive recruiting for labour or services. Category B jurisdiction applies to all of these offences.

Colombia

8. Colombia reiterated its previous comments (see A/66/93, paras. 10-17). As an adherent to the dualist theory of international law, it considers that, in order for legal proceedings to be initiated, the act in question must be established as a crime under its domestic criminal law. Under article 2 of the Penal Code (Act No. 599 of 2000), international treaties and conventions ratified by Colombia and the Political Constitution are part of the Penal Code. In addition, Colombia recognized that, given the difficulty of gathering evidence and the requirement that the accused be present in the territory of the prosecuting State, systems for mutual cooperation in judicial matters must be strengthened.

9. In addition to reiterating the role of article 93 of the Political Constitution of Colombia (see A/66/93, para. 11), Colombia noted that article 94 states that the rights and guarantees enshrined in the Constitution and in the international conventions that are currently in force shall not be understood as negating other rights and guarantees which, because they are inherent to humanity, are not expressly mentioned therein.

10. Under articles 24, 28 and 29 of the Code of Criminal Procedure (Act No. 906 of 2004), universal jurisdiction may be exercised pursuant to a signed and ratified treaty or to the provisions of domestic law that establish such jurisdiction.

11. Article 16 of the Penal Code provides for the prosecution of an alien who commits an offence against another alien and is in Colombian territory in cases where the sentence provided for in Colombian law is longer than three years, the offence is not political in nature or a request for extradition has been denied by the Government of Colombia.

Greece

12. Article 8 of the Greek Penal Code establishes universal jurisdiction for the following categories of crimes, in that Greek penal laws are applicable to Greek nationals and non-nationals alike, irrespective of the laws of State where the act was committed:

(a) High treason, treason against the Greek State and terrorist acts;

(b) Crimes concerning military service and the obligation for conscription;

(c) Punishable acts committed by persons in their capacity as civil servants of the Greek State;

(d) Acts against a Greek civil servant in the exercise of his/her duties or related to his/her duties;

(e) Perjury in the context of proceedings pending before Greek authorities;

(f) Piracy;

(g) Crimes against the currency;

(h) Slave-trade, trafficking in human beings, forced prostitution or sexual abuse of minors for profit, child sex tourism or child pornography;

(i) Illegal trafficking in narcotic drugs;

(j) Illegal circulation and trafficking in obscene publications;

(k) Any other crimes to which Greek penal laws apply by virtue of specific provisions or international conventions signed and ratified by Greece.

Greece noted that article 8 has primarily been applied in cases of trafficking in narcotic drugs. Under the article, national jurisdiction is exercised irrespective of the location of the crime or the nationality of the alleged victim or perpetrator, and is concurrent to the jurisdiction of other States. No application by a foreign authority or by the victim is necessary for prosecution to commence.

13. Law 3658/2008 on "Measures for the protection of cultural property and other provisions" (Official Gazette, vol. A 70/22.4.2008) stipulates in article 13, paragraph 4, that the offences provided for in chapter 9 of Law 3028/2002 on the "Protection of antiquities and cultural heritage in general" (Official Gazette, vol. A 153/28.6.2002) are prosecuted and punished according to Greek penal laws even if committed abroad. Additionally, article 2 of Law 3948/2011 (Official Gazette, vol. A 71/5.4.2011) on the "Adjustment of domestic law provisions to the provisions of the Statute of the International Criminal Court ratified by Law 3003/2002 (A 75)" provides that the provisions of that law are applicable both to national and non-nationals for all acts enumerated in articles 7 to 15 (i.e. genocide, crimes against humanity, war crimes, violation of the duty of supervision, omission to report a crime) provided that they have been committed:

(a) In the territory of the Greek State or on board Greek vessels or aircrafts, wherever they are present, unless they are subject to foreign legislation according to international law;

(b) Abroad, by Greek nationals or foreigners who acquired Greek nationality after the commission of the act;

(c) Abroad, against the Greek State or Greek nationals.

14. Greece is also a party to a number of international conventions which include *aut dedere aut judicare* obligations.

Hungary

15. Within Hungary, universal jurisdiction is defined in two provisions. Pursuant to subparagraph (c) of paragraph (1) of article 4 of the effective Act IV of 1978 on the Criminal Code, Hungarian law shall be applied to any act committed by a non-Hungarian citizen in a foreign country if it is a crime against humanity or any other crime that is to be prosecuted under an international treaty. Moreover, pursuant to item (ac) of subparagraph (a) of paragraph (2) of article 3 of Act C of 2012 on the Criminal Code, Hungarian law shall be applied to any act specified in chapters XIII (crimes against humanity) and XIV (war crimes) or to any other crime that is to be prosecuted under an international treaty.

16. Pursuant to both of these provisions, there was no requirement that the act be a crime where the crime was perpetrated.

Lebanon

17. Lebanon reiterated that it was not a party to any treaties or agreements on universal jurisdiction. Lebanese law contains no provisions that could be interpreted as establishing universal jurisdiction (see A/65/181, generally, and A/66/93, para. 22).

Moldova

18. Universal jurisdiction is regulated by article 11, paragraph 3 of the Penal Code, which stipulates that:

> If not convicted in a foreign state, foreign citizens and stateless persons without permanent residence on the territory of the Republic of Moldova who commit crimes outside the territory of the Republic of Moldova shall be criminally liable under this Code and shall be subject to criminal liability on the territory of the Republic of Moldova provided that the crimes committed are adverse to the interests of the Republic of Moldova or to the peace and security of humanity, or constitute war crimes set forth in the international treaties to which the Republic of Moldova is a party.

19. Provisions of the Penal Code referring to crimes against the peace and the security of humanity and to war crimes are listed in the Special Part, articles 135 to 144. International regulations to which Moldova is a party take precedence and can be applied directly as per article 1, paragraph 3 of the Penal Code. Law No. 45 of 7 February 2013 amended the Penal Code to provide criminalization under the domestic law for crimes under the Rome Statute, referring to articles 127 (persons protected by international humanitarian law); 130 (mercenaries); 135 (genocide); 135 (1) (crimes against humanity); 137 (war crimes against humanity); 137 (1) (war crimes against property and other rights); 137 (2) (use of prohibited means in the conduct of war); 137 (3) (use of prohibited methods in the conduct of war); 137 (4) (unlawful use of distinctive international humanitarian law signs).

Panama

20. Panama reiterated the information contained in paragraphs 18 to 20 of the previous report (A/67/116).

Sweden

21. Sweden reiterated information contained in previous reports (see A/66/93, paras. 43-45 and A/67/116, para. 21).

2. Applicable international treaties

22. A list of the treaties referred to, on the basis of information received, by Governments is provided in table 2.

B. Conditions, restrictions or limitations to the exercise of jurisdiction

1. Constitutional and domestic legal framework

Hungary

23. Hungary indicated that any criminal proceedings conducted under universal jurisdiction shall be instituted by the Prosecutor General. It is contemplated that the prosecution by the Hungarian authorities of crimes committed by a foreign citizen or a stateless person may affect Hungary's international relations.

Moldova

24. Moldova confirmed that, pursuant to article 60, paragraph 8 of its Penal Code, there is no statute of limitations for the crimes listed in article 11, paragraph 3 of the Penal Code.

Spain

25. Spain reiterated its comments contained in paragraphs 74 to 78 of document A/66/93, and emphasized that following the 2009 (Organization Act No. 1/2009) reform of the Judicial Power Organization Act No. 6/1985, it is no longer possible to speak of an absolute principle of universal jurisdiction in Spain since, under the new paragraph 4 of article 23, it is subject to the existence of "a relevant link with Spain" and some subordination of Spanish jurisdiction to another competent jurisdiction (concurrent jurisdiction), whether national or international, provided that proceedings for the effective investigation and prosecution of the offences in question have been initiated in that other jurisdiction.

Sweden

26. Sweden reiterated information contained in the previous report (see A/67/116, paras. 25-27).

2. Judicial and other practice

Moldova

27. From 2004 to 2013, no national court examined any criminal case initiated under articles 135 to 144 of the Penal Code and no domestic practice in universal jurisdiction exists.

Colombia

28. Colombia drew attention to its previous comments (see A/66/93, para. 53) and noted that while no known cases exist in which universal jurisdiction has been exercised in Colombia in respect of a violation of human rights committed by an alien in another country, or in which extradition has been requested in the exercise of universal jurisdiction, the Constitutional Court has stated, in judgement No. C-979 of 2005, that it is in the interests of all States to investigate and punish the most serious violations of human rights and international humanitarian law, such as genocide, torture and enforced disappearance, and that it is in the legitimate interest of any State to exercise jurisdiction on behalf of the international community in order to investigate, prosecute and punish the perpetrators of such crimes.

Spain

29. Three recent examples of Spanish jurisprudence on universal jurisdiction were of particular note.

30. First, by Order 1566 of 6 October 2011, section 1 of the Criminal Chamber of the Supreme Court established the inadmissibility of the appeal brought against the order that had dismissed allegations concerning crimes against humanity, torture and war crimes allegedly committed by certain Chinese authorities against the people of Tibet.

31. Second, on 29 October 2012, the Central Court of Investigation No. 5 of the National High Court indicted seven Chilean soldiers on allegations of the crime of genocide (as well as the alleged crimes of murder and kidnapping) concerning the death of a Spanish national working as an international civil servant at the Economic Commission for Latin America. The order highlighted that "the criminal proceedings initiated in a Spanish court shall be temporarily stayed in the event that it is established that proceedings based on the alleged acts have been initiated in the country or by the [international] Court".

32. Third, by Order 1916 of 20 December 2012, section 1 of the Criminal Chamber of the Supreme Court established the inadmissibility of the appeal against the Order of the Criminal Chamber of the National High Court on 23 March 2012. The Spanish courts were found to lack jurisdiction to investigate allegations of torture and ill-treatment at the Guantánamo Bay detention centre, in application of the principle of subsidiarity, since the authorities of the United States of America had demonstrated that administrative and criminal proceedings had been, or were being, conducted to investigate the facts.

III. Scope and application of universal jurisdiction: comments by observers

African Union

33. The African Union highlighted the adoption by the Assembly of Heads of State and Government of the decision on the abuse of the principle of universal jurisdiction (Assembly/AU/Dec.420(XIX)). In that decision the Assembly urged African Union member States to use the principle of reciprocity to defend themselves against the abuse of universal jurisdiction. It reiterated its request that warrants of arrest issued on the basis of the abuse of universal jurisdiction not be executed by any member State. The Assembly requested the African Union Commission to send an official communication to the European Commission asking the latter to request the Government of Spain to comply with the laws of Spain with respect to the arrest warrants issued against Rwandan leaders. The African Union additionally adopted the African Union Model National Law on Universal Jurisdiction over International Crimes.[2]

[2] The model law is on file with the Codification Division of the Office of Legal Affairs of the Secretariat.

Council of Europe

34. The Council of Europe reiterated its previous submission (see A/66/93, paras. 110-113). On 13 June 2012, the Committee of Ministers adopted a Reply to Recommendation 1953 (2011) of the Parliamentary Assembly of the Council of Europe, entitled "The obligation of member and observer states of the Council of Europe to co-operate in the prosecution of war crimes". The Committee stated, inter alia:

> 6. The Committee of Ministers furthermore notes that several member States of the Council of Europe have acknowledged the principle of universal jurisdiction. However, there is no international consensus on the definition and scope of this principle, as the exercise of universal jurisdiction is in practice often subject to legal limitations defined in national legislation. Considerable challenges therefore remain for domestic legal systems to ensure the exercise of universal jurisdiction efficiently and effectively.
>
> 7. The Committee of Ministers therefore considers that the Council of Europe could reinforce the application of the principle of *aut dedere aut judicare* as a means of prosecuting war crimes effectively in cases where universal jurisdiction cannot be exercised. It also encourages enhancing co-operation between the member and observer States.

35. In its judgment of 12 July 2007, *Jorgic v. Germany*,[3] the European Court of Human Rights held that Germany had not violated article 6, paragraph 1 of the European Convention on Human Rights concerning the right to a trial by a "tribunal established by law". The applicant, a national of Bosnia and Herzegovina of Serb origin, legally resided in Germany from 1969 until the beginning of 1992. He then returned to Bosnia. On 16 December 1995 the applicant was arrested when entering Germany and placed in pre-trial detention on the ground that he was strongly suspected of having committed acts of genocide.

36. Pursuant to article I of the Convention on the Prevention and Punishment of the Crime of Genocide, the Contracting Parties were under an *erga omnes* obligation to prevent and punish genocide, the prohibition of which forms part of *jus cogens*. In view of this, the Court held that the national courts' reasoning that the purpose of the Genocide Convention, as expressed notably in that article, did not exclude jurisdiction for the punishment of genocide by States whose laws establish extraterritoriality in this respect was reasonable and convincing. The Court found support for its interpretation from the express acknowledgment of the principle of universal jurisdiction for genocide by the International Tribunal for the Former Yugoslavia, as well as the statutory provisions and case law of numerous other Contracting Parties.

International Committee of the Red Cross

37. The International Committee of the Red Cross (ICRC) reiterated its comments contained in paragraphs 121 to 140 of the 2011 report (A/66/93). It updated its data on the number of States Parties to Additional Protocol I to the Geneva Conventions of 12 August 1949 (173); the number of States that have vested their national courts

[3] European Court of Human Rights, Fifth Section, 12 July 2007, *Jorgic v. Germany*, Application No. 74613/01.

with universal jurisdiction to a certain degree over serious violations of international humanitarian law (over 100); and the activities of the ICRC Advisory Service, which hosted an expert consultation on universal jurisdiction in December 2012, focused on developments in universal jurisdiction since the establishment of the International Criminal Court.

38. It stressed that in addition to the International Tribunals for Rwanda and the Former Yugoslavia, the International Residual Mechanism for Criminal Tribunals and the International Criminal Court (ICC), universal jurisdiction remains an essential tool to break the cycle of impunity. In accordance with the Geneva Conventions of 1949 and their Additional Protocols of 1977 and 2005, it remains the responsibility of States to bring perpetrators to face justice. In those instances where States may be unable or unwilling to prosecute their citizens or crimes committed on their territory, universal jurisdiction has a role to play to bridge the impunity gap that may exist between domestic and international criminal prosecution.

39. While there may be national policy considerations in the application of universal jurisdiction, the independence of the judiciary and fair trial guarantees must be respected at all times.

IV. Nature of the issue for discussion: specific comments by States

Colombia

40. Colombia considers that universal jurisdiction is residual in nature and is exercised in respect of offences that are alleged to have been committed in the territory of another State, by nationals of another State and against nationals of another State, and that pose no direct threat to the vital interests of the State that purports to exercise jurisdiction. It notes that universal legislative jurisdiction is more prevalent than universal contentious jurisdiction, but that both are potentially applicable.

41. Colombia emphasizes that universal jurisdiction must be distinguished from the jurisdiction of international tribunals, specifically that of the International Criminal Court, and from the principle of *aut dedere aut judicare*, which are complementary strategies to combat impunity. The primary issues for discussion are the questions of competing jurisdictions; the importance of *jus cogens*; whether the exercise of universal jurisdiction is optional or compulsory; and the relationship with amnesty or pardon.

Cuba

42. Cuba[4] reiterated its view that the application of universal jurisdiction should be regulated at the international level to prevent its unwarranted use in a unilateral, selective and politically motivated manner. Cuba supports the drafting of international norms or guidelines establishing clearly under what conditions or within which limits universal jurisdiction may be invoked, as well as the crimes that are subject to the principle, if there is international consensus in this regard. The application of universal jurisdiction must respect the principles enshrined in the

[4] For previous comments submitted by Cuba, see A/65/181 and A/67/116.

Charter of the United Nations, in particular the principles of sovereign equality, political independence and non-interference in the internal affairs of States, and should be defined as exceptional and supplementary in nature.

43. Cuba emphasized that universal jurisdiction should only be applied under exceptional circumstances when there is no other way to bring proceedings against the perpetrators, and must be limited by absolute respect for the sovereignty of and always be supplementary to the actions and national jurisdiction of States. Cuba noted that the approval of the State in which the crime was committed or the countries of which the accused is a national must be obtained prior to the use of universal jurisdiction.

44. Cuba noted that the application of the principle should not violate the immunity granted under international law to Heads of State and Government, diplomatic personnel and other incumbent high-ranking officials.

45. Cuba suggested universal jurisdiction be restricted to crimes against humanity.

Lebanon

46. Lebanon reiterated its previous observations (see A/66/93, paras. 146-148).

Panama

47. Panama reiterated the information contained in paragraphs 38 and 39 of the previous report (A/67/116).

Table 1
Specific legislation relevant to the subject, based on information submitted by Governments

Category	*Legislation*	*Country*
Slave trade or traffic in slaves	Division 270 of the Criminal Code	Australia
	Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Act 2013	Australia
Genocide	Law No. 45 of 7 February 2013 (amending article 135 of the Penal Code)	Moldova
	Swedish Criminal Code, chapter 2, section 3.7	Sweden
Mercenaries	Law No. 45 of 7 February 2013 (amending Article 130 of the Penal Code)	Moldova
Crimes against humanity	Law No. 45 of 7 February 2013 (amending article 135 (1) of the Penal Code)	Moldova

Category	*Legislation*	*Country*
	Article 4 of the effective Act IV of 1978 on the Criminal Code; article 3 of Act C of 2012 on the Criminal Code	Hungary
War crimes	Penal Code, article 11; Law No. 45 of 7 February 2013 (amending Articles 127 and 137 of Penal Code)	Moldova
	Article 3 of Act C of 2012 on the Criminal Code	Hungary
Crimes against international law	Swedish Criminal Code, chapter 2, section 3.6 and chapter 22, section 6 (defining a crime against international law as "a serious violation of a treaty or agreement with a foreign power or an infraction of a generally recognized principle or tenet relating to international humanitarian law concerning armed conflicts")	Sweden
Offences against the State	Penal Code, article 11	Moldova
	Penal Code (Act No. 599 of 2000), article 16 (offences against the existence and security of the State; offences against the Constitution and the legal order; offences against the economic and social order, with the exception of money-laundering; offences against the public administration)	Colombia
Offences against peace and the security of humanity	Penal Code, article 11	Moldova
Offences against morality and exploitation	Act No. 23 of 7 July 2004 (approving article 3 (a) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime)	Panama

Category	*Legislation*	*Country*
Money/property laundering	Penal Code, article 389, as amended by article 11 of Act No. 1 of 5 January 2004	Panama
Counterfeiting	Penal Code (Act No. 599 of 2000), article 16	Colombia
Financing of terrorism	Penal Code (Act No. 599 of 2000), article 16	Colombia
Administering resources linked to terrorist activities	Penal Code (Act No. 599 of 2000), article 16	Colombia
Trafficking in narcotics/drugs	Act No. 13 of 27 July 1994	Panama

Table 2
Relevant treaties that were referred to by Governments, including treaties containing *aut dedere aut judicare* provisions

A. Universal instruments

Genocide	Convention on the Prevention and Punishment of the Crime of Genocide, 1948	Colombia, Moldova, Spain
International humanitarian law	Geneva Conventions of 1949 and the Additional Protocols thereto	Panama, Moldova, Spain
International criminal law	Rome Statute of the International Criminal Court, 1998	Colombia, Moldova, Spain, Sweden
Narcotic drugs and psychotropic substances	United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988	Moldova
Corruption and transnational organized crime	Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, 1990	Moldova
	United Nations Convention against Transnational Organized Crime, 2000	Colombia
	United Nations Convention against Corruption, 2003	Colombia

Torture	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984	Colombia, Spain, Sweden
Trafficking in persons	Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, 2000	Colombia, Panama
Crimes against internationally protected persons, including diplomatic agents	Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 1973	Spain
Enforced disappearance	International Convention for the Protection of All Persons from Enforced Disappearance, 2006	Colombia, Panama
Terrorism-related offences	European Convention on the Suppression of Terrorism, 1977	Moldova
Protection of cultural property in the event of armed conflict	Second Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict, 1999	Panama
Non-applicability of the statute of limitations	Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, 1968	Colombia
General	Charter of the United Nations, 1945	Cuba

B. Regional instruments

Human rights	European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950	Spain